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Court of Cassation rules on status of reality television participants

Contributed by **Nomos**

August 01 2013

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A series of disputes pitted a reality television show production company against programme participants to determine whether their relationship served to qualify the participants as employees or whether the participants should be classified as performers.(1) The disputes, which could have resulted in a potential windfall for the participants, allowed the Court of Cassation to address a new problem relating to the evolution of this television genre. The Court of Cassation held that the participants should not be classified as performers, while recognising their employed status on the basis of the factual circumstances underlying their agreements with the production company.

Initial decisions

On February 12 2008 the Paris Court of Appeal ruled that that the programme participants had provided work services under the authority of the production company and with the intention of producing a televison series. The Labour Division of the Court of Cassation upheld this decision on June 3 2009; however, it annuled that part of the judgment which obliged the production company to pay each participant an indemnity for undeclared work.

The matter was referred to the Versailles Court of Appeal, which on April 5 2011 confirmed that the participants had entered into employment contracts, but refused to award them performer status.

The participants appealed to the Court of Cassation, seeking to be recognised as performers, while the production company cross-appealed to determine whether the relationship qualified as an employment contract.

Court of Cassation decision

The cross-appeal was considered first. Disputing the existence of an employment contract, the production company claimed that in the absence of any specific request from it, the participants allowing themselves to be filmed could not be equated with them providing a service, and a simple connection to the economic value of the programme was insufficient to earn this classification. The second part of the plea sought to rule out the existence of an employment contract, on the basis that participants had made declarations that their involvement was personal and unprofessional, with their remuneration rather representing compensation for the exploitation for commercial purposes of various attributes of their personalities.

The First Civil Chamber dismissed this plea, repeating the arguments of the Labour Division. It confirmed that "the existence of an employment relationship depends neither on the will expressed by the parties nor on the name they have given their agreement, but on the factual circumstances under which the worker's activities are carried out". It went on to discuss the different elements that can characterise the existence of a relationship of authority, which include:

- "the existence of a 'bible' laying out the sequence of days and imposing the order of activities to be filmed, of stagings duly repeated, of interviews conducted so that the interviewee was led to say what was expected by the production"; and
- "the selection of clothing by the production, schedules imposed up to twenty hours a day, having to live on the site and the inability to engage in personal activities, the introduction of sanctions, including monetary ones in the event of departure during filming."

The judgment summarised these factual circumstances as a "duty to follow the activities planned and organised by the production company".

Another indication of an arm's-length agreement was that the company could withdraw participants' passports and phones. Adopting the Labour Division's grounds, the First Civil Chamber returned to the purpose of the production - namely, "the production of a good having economic value" - to characterise "work services performed under the authority of the production company, and with the intention to produce a 'TV series'". The service was considered to be provided for a time and at a place unrelated to the normal personal lives of the participants, and involved participation in organised activities and expression of expected reactions, which differed - even if only slightly - from their real daily lives.

The main appeal was to consider the classification of the participants as performers. A 'performer' is defined in Article L212-1 of the Intellectual Property Code as "a person who acts, sings, recites, declaims, plays or executes in any other way a literary or artistic work." The Versailles Court of Appeal cited this text in denying the participants performer status, which would have had the effect of bringing them under the national collective agreement for performers in television programmes and its many advantages in terms of compensation for primary and secondary use of programmes.

The participants had sought to claim the addition by the court of appeal of criteria to the text of Article L212-1, including the need for "the embodiment of a role" by the participants - a role involving the interpretation of a character other than themselves. For its part, the court of appeal had noted the existence of a bible stipulating, among other things, the succession of participants' days and a set of factual circumstances intended to treat them as actors engaged in, variously, a more or less free improvisation game, guided by a film crew, following a narrative structure and an imposed storyline. This argument was supported by the fact that the court of appeal described the programme as a 'television series' in accepting its qualification as a work of authorship.

The First Civil Chamber agreed with the court of appeal's decision to reject the participants' performer status and the consequent application of the national collective agreement for performers, holding that:

- "the job of an actor is to play a character other than himself";
- the participants in the programme did not have to interpret a work of art or characters;
- they had no role to play and no lines to speak; and
- they were asked only to be themselves and to express their reactions to the situations that they faced.

It concluded that "the artificial nature of the situations and their sequence does not suffice to grant participants the status of actors". Reality show participants cannot claim to have the status of performers when they are asked only to be themselves.

Without returning to the classification of the programme concerned and its potential eligibility for copyright protection, the Court of Cassation noted, without qualification, that the participants' involvement supported no other interpretation and therefore rejected the appeal. The issue of copyright protection for reality television programmes is tricky and cannot be treated within the framework of this kind of dispute, given that the parties had intended neither to assert nor to challenge the programme's eligibility for such protection.

Comment

The rules applicable to participants in reality shows have been established: when appearing in such shows, they are working, not playing!

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Endnotes

(1) First Civ., April 24 2013, 399.

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